Volume 75
Issue 1 *Dickinson Law Review - Volume 75, 1970-1971*

10-1-1970

Allowance of "Interest" on Unliquidated Tort Damages in Pennsylvania

Larry Folmar

ALLOWANCE OF "INTEREST" ON UNLIQUIDATED TORT DAMAGES IN PENNSYLVANIA

This Comment deals with the problem in Pennsylvania of compensating a plaintiff for the detention of his unliquidated tort damages between the time of the destruction of, or damage to, his real or personal property, or injury to his person, and the time when he is awarded a verdict for such damages. Compensation for detention of damages pursuant to statutory rights, such as survival[1] and wrongful death[2] acts, will not be considered.

Part one of this Comment will analyze the historical development of the rules of law in Pennsylvania by which a plaintiff is compensated for the detention of his damages from the time of the destruction of, or damage to, his property to the time when he receives a verdict for such destruction or damage. The treatment given this problem in other jurisdictions will be examined in part two. The final part of this Comment will compare and analyze methods used to treat this problem in Pennsylvania and certain other jurisdictions, and will offer a conclusion as to the remedial effect of legislation pending in the Commonwealth.

I. The Law in Pennsylvania

The problem of compensating a plaintiff for detention of his unliquidated tort damages[3] from the time of damage or injury has had a changing history in Pennsylvania. This change does not result from the method of compensating the plaintiff, but rather from confusion over whether to call the compensation "interest"[4] or

1. Pa. Stat. Ann. tit. 20, § 320.601 (1950).
2. Pa. Stat. Ann. tit. 12, § 601 (1953).
3. H. Oleck, Damages to Persons and Property § 63 (1961):
   When damages are uncertain in amount, and need to be established by agreement or by a jury or court, they are said to be "unliquidated damages."
Id.
4. "Interest," with respect to use of money (for loss of its use) is the compensation set by parties, or fixed by the law, for the use, forbearance, or detention of money. Or, it is the damages granted by the law for loss of use of the money which would make an injury whole, computed from the time when the injury occurred.
Id. § 295, n.3; C. McCormack, Damages § 50 (1935):
   "Interest" is compensation allowed by law or fixed by the parties for the use or detention of money, or allowed by law as additional damages for loss of use of the money due as damages, during the lapse of time from the accrual of the claim.
Id. at 205.

"compensation for the delay, of which the rate of interest affords the fair legal measure."[5] The following discussion of this chronological change in terminology will reveal that a plaintiff may or may not recover compensation for detention of his damages, depending upon the terminology used by a judge in his charge to the jury, and will also elicit all other important factors which a court and jury must consider before allowing a plaintiff compensation for detention of his unliquidated tort damages in Pennsylvania.

The first case of interest is *Railroad Co. v. Gesner*,[6] wherein the defendant railroad took plaintiff decedent's lands by virtue of an Act of Assembly,[7] but without making the required compensation to the decedent. The plaintiff's decedent didn't prosecute his claim during his lifetime because of his mental incapacity. On certiorari, the Supreme Court of Pennsylvania held that the plaintiff's decedent was entitled to interest on his "demand for justice against those who have so long had the use of his property without condescending to pay the slightest regard to his rights."[8]

Two important factors should be noted in *Gesner*. First, the court awarded interest *eo nomine*.[9] This illustrates the fact that interest *eo nomine* was readily allowed on unliquidated damages in Pennsylvania in 1853, from the time of the event to the time a verdict was rendered.

As will be seen in the following cases, the Pennsylvania Supreme Court later decided that it would not allow interest *eo nomine* for the detention of the plaintiff's damages from the time of the event to the time a verdict was rendered. Instead, a trial judge or jury would be allowed to award "compensation for the delay, of which the rate of interest affords the fair legal measure."[10] The second factor to be noted in *Gesner* is that the court awarded interest *eo nomine* for detention of damages from the time of the event because of culpable conduct on the defendant railroad's part. Thus, in 1853, the plaintiff was not entitled to such interest as a matter of right, but only if the detention of the damages was caused by the defendant's inexcusable reluctance to pay them. If the plaintiff had asked for an unreasonable sum in settlement the defendant would have had a valid excuse for not paying the damages before suit. In such a case the plaintiff would not be entitled to interest from the date of damage or destruction. Although this rationale is implicit in *Gesner*, later cases have clarified this reasoning.[11]

5. Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 75, 263 A.2d 336, 337 (1970).
6. 20 Pa. 240 (1853).
7. *Id.*
8. Railroad Co. v. Gesner, 20 Pa. 240, 242 (1853).
9. Interest *eo nomine* is Latin for interest "under that name".
10. Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 75, 263 A.2d 336, 337 (1970).
11. *E.g.*, Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 263 A.2d 336 (1970); Richards v. Citizens Natural Gas Company, 130 Pa. 37, 18 A. 600 (1889).

Gesner was not a tort action. Instead, it was very similar to a proceeding in eminent domain. However, later Pennsylvania cases[12] cited *Gesner* as authority for the proposition that interest *eo nomine* could be allowed from the time of damage or destruction on unliquidated *tort* damages. It was sound reasoning to cite *Gesner* for such a proposition, because the reason "underlying the award of damages for damage to or destruction of property is the same as that which applies in awarding damages or compensation in eminent domain cases, viz., to give the injured party full compensation for the loss that he has suffered;. . . ."[13]

Gesner was followed four years later in *Delaware, Lack. & W. R.R. v. Burson*,[14] an action also more similar to condemnation than tort. Interest *eo nomine* was allowed at the jury's discretion, based upon the defendant's "wrongful" detention of the damages.[15]

Four years later, in *Pennsylvania R.R. v. Patterson*,[16] the Pennsylvania Supreme Court allowed interest *eo nomine* on a plaintiff's unliquidated losses from the time they were sustained. The important thing about *Patterson* is that it was a tort action brought in case and was not similar to an eminent domain proceeding. Therefore, in 1873 the Pennsylvania Supreme Court was allowing interest *eo nomine* on unliquidated tort damages from the time of the damage or destruction. One anomaly about *Patterson* is that the trial judge instructed the jury that if they found that the defendant's negligence caused the plaintiff's injury, his damages "*would* include interest on his losses from the time they were sustained."[17] In effect, the trial judge gave the jury a mandatory instruction to allow interest if they found that the plaintiff's damages had been caused by the defendant's negligence. This is unusual because in almost all other cases interest has been awarded at the discretion of the trier of facts.[18] The Pennsylvania Supreme Court approved the entire

12. *E.g.*, Bare v. Hoffman, 79 Pa. 71 (1875).
13. Chesapeake & O. Ref. Co. v. Elk Ref. Co., 186 F.2d 30, 35 (4th Cir. 1950).
14. 61 Pa. 369 (1869).
15. *Id.* at 374.
16. 73 Pa. 491 (1873). In this case the defendant was statutorily obligated to repair a certain canal and canal locks which is bought from the state. The defendant failed to meet this obligation and as a result the plaintiff carrier brought suit for damages he suffered for delay in hauling his cargoes and that he was required to haul lesser cargoes than those offered to him because of the disrepair.
17. *Id.* at 499 (emphasis added).
18. *See, e.g.*, Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 263 A.2d 336 (1970); Conover v. Bloom, 269 Pa. 548, 112 A. 752 (1921); Stevenson v. Ebervale Coal Co., 203 Pa. 316, 52 A. 201 (1902); Richards v. Citizens Natural Gas Co., 130 Pa. 37, 18 A. 600 (1889).

instruction.[19]

The Pennsylvania Supreme Court in *Bare v. Hoffman*,[20] an 1875 tort action brought in case, held that the jury could award the plaintiff interest on his unliquidated tort damages. The jury was allowed to compute interest *eo nomine* on the damages from the date of the damage if, in light of all the facts, it felt the plaintiff was entitled to such interest. The court cited *Railroad Co. v. Gesner*[21] as authority for its holding.[22] Thus, in 1875, the rule of law in Pennsylvania was that a plaintiff could recover interest on his unliquidated tort damages to property from the time of the happening of the event. He could recover such interest at the discretion of the trier of the facts, based upon all the facts of the case. This implicitly overruled *Patterson*, which said the trial judge could give the jury binding instructions to allow interest.[23]

Several years later, in *Weir v. County of Allegheny*,[24] it was held that if a defendant's liability for property damage arose entirely from a statute which did not provide for interest, then the plaintiff could not be awarded interest from the date of the event until the date he recovered a judgment. This holding did not affect the allowance of interest in cases wherein liability was not predicated upon a statute.[25] Interest *eo nomine* was still allowable in ordinary tort cases on the theory that without "the addition of interest on the value of the property from the time it was destroyed, the remedy of the plaintiffs would be destroyed."[26] But, in 1883, the year previous to that in which the court uttered the holding cited in the preceding sentence, it cited *Weir* as standing for the proposition that interest was not allowable on unliquidated tort damages.[27] An examination of *Pittsburg S.R.R. v. Taylor*,[28] the case which presented this proposition, shows that the court probably stated it because the trial judge had instructed the jury that they could allow interest on any lump sum verdict they might award the plaintiff for the property damage and physical injuries for which he was suing. The primary holding of *Taylor* was that interest could not be allowed on personal injuries from the time of the injury.[29] For this reason the court apparently decided that

19. Pennsylvania R.R. v. Patterson, 73 Pa. 491, 501 (1873).

20. 79 Pa. 71 (1875). In this case the defendant was held to be liable for damages resulting from his diverting water needed by the plaintiff to run his tannery.

21. 20 Pa. 240 (1853).

22. Bare v. Hoffman, 79 Pa. 71, 78 (1875).

23. *See* note 17 and accompanying text *supra*.

24. 95 Pa. 413 (1880). The plaintiff brought his action for damages to his property caused by a rioting mob. The county's liability for such damages arose wholly by reason of an Act of Assembly.

25. *See* City of Allegheny v. Campbell, 107 Pa. 530, 535 (1884).

26. *Id.*

27. Pittsburgh S.R.R. v. Taylor, 104 Pa. 306 (1884).

28. *Id.*

29. *See, e.g.*, Wittmer v. Bessemer & L.E.R.R., 241 Pa. 112, 116, 88 A.

interest could not be allowed on a verdict in which damages for personal injuries were not separated from damages for injury to property.

Confusion over whether interest on unliquidated tort damages to property could be awarded followed the decision in *Pittsburg S. R.R. v. Taylor*.[30] In *Township of Plymouth v. Graver*[31] the plaintiff sued for the death of his horse caused by the defendant's negligence. The trial court instructed the jury that they could allow interest from the date of the horse's death on whatever damages they might award. The defendant appealed and the Pennsylvania Supreme Court affirmed, stating:

> It is true the plaintiff was not entitled to interest, as such, upon the value of his horse, but on computing the amount of the damages, the jury may consider the time which has elapsed since the injury was received. There is some conflict in the cases, (*Railroad Co. v. Taylor*, 104 Pa. St. 306; *Allegheny v. Campbell*, 107 Pa. St. 530), but this we think is the rule generally recognized. The instruction of the court in this respect was perhaps not strictly accurate, but the verdict was small, and the amount of the interest unimportant. We do not feel that we should disturb the judgment on that ground.[32]

It is submitted that this holding was the genesis of the doctrine in Pennsylvania that the jury may award the plaintiff compensation for the detention of his damages from the time of the event, but that such compensation must never be called "interest". This was done by intentionally or inadvertently misinterpreting the holding in *Pittsburg S.R.R. v. Taylor*[33] and by impliedly adopting the holdings of whatever other jurisdictions may have had such a doctrine at that time. The factor which probably prompted the court to adopt this doctrine is buried in the history of the legal concept of "interest".[34] Thus, interest *eo nomine* was no longer allowed on unliquidated tort damages from the time of the happening of the event. Instead, the trier of the facts, in its discretion, could award compensation for the time elapsed during which the plaintiff was deprived of his damages.[35]

314, 315 (1913); McGonnell v. Pittsburgh Ry., 234 Pa. 396, 400, 83 A. 282, 283 (1912).

30. 104 Pa. 306 (1884).
31. 125 Pa. 24, 17 A. 251 (1889).
32. *Id.* at 37, 17 A. at 251.
33. 104 Pa. 306 (1884).
34. This factor is that interest has long been legally equated with the unpleasant word "usury". See discussion in section II of this Comment, *infra*.
35. Just what amount should be given will be shown in later cases.

The distinguishing between "interest" and "compensation for detention of damages" did not have serious consequences in *Township of Plymouth v. Graver*[36] because the court considered the amount awarded to be too small to warrant striking off. The question remained, however, as to what might be done if a trial court erroneously were to instruct the jury that they might award interest instead of instructing them that they may award compensation for detention of damages, and the jury were then to award a large sum. The answer to this question will be found by unfolding the remaining history in Pennsylvania of the distinction between interest and detention of damages.

In 1889, in *Reading & P.R.R. v. Balthaser*,[37] the same year as the decision in *Township of Plymouth v. Graver*,[38] the plaintiff brought an action to recover damages for the defendant's appropriation of her lands. The trial court instructed the jury that they might allow interest from the time of the appropriation on any damages they might award. The Supreme Court of Pennsylvania said this was error. A jury should be told to allow interest on damages *ex contractu*, but in an action ex delicto they must be told to consider the lapse of time between the happening of an injury and the time of trial in making up the amount of damages. In arriving at this compensation they were to consider ". . . the nature of the wrong, the attending circumstances, and the time when it was committed, . . ."[39] As to the disposition of the case the court said:

> We might not have reversed for this alone, but, as the case goes back for other reasons, we again call attention to this well-settled distinction between actions resting on contract and, those growing out of a tort, so far as interest is concerned.[40]

Two other cases decided in 1899 give the present day rule as to what factors the jury should consider in deciding whether to allow compensation for detention of damages and how the value of such compensation is to be measured. As to measuring the value of such compensation, in *Pennsylvania S.V.R.R. v. Zeimer*[41] the court said:

> In cases of this kind interest is not allowed as interest, but it is usual to instruct the jury to increase the damages by that amount. In other words, interest is allowed as damages. If it were otherwise, a person whose property had

---

(This theory of allowing damages for the time elapsed since the injury will be referred to as "compensation for detention of damages" in the remainder of this Comment).

36. 125 Pa. 37, 17 A. 251 (1889).
37. 126 Pa. 1, 17 A. 518 (1889).
38. 125 Pa. 37, 17 A. 251 (1889).
39. Reading & P.R.R. v. Balthaser, 126 Pa. 1, 12, 17 A. 518, 519 (1889).
40. *Id.*
41. 124 Pa. 560, 17 A. 187 (1889). In this case the plaintiffs brought an action for consequential damages caused by the construction of defendant's railroad. The plaintiffs claimed the new construction interfered with the drainage of their property and rendered access to a portion of their property dangerous.

> been taken, injured or destroyed would not receive full satisfaction. *Railroad Co. v. Miller*, 125 Mass. 1; *Railroad Co. v. Burson*, 61 Pa. St. 369.[42]

Hence, the interest rate is used to compensate a plaintiff for detention of his damages, but it must not be called interest *eo nomine*. As authority for the proposition that this is the only way to make the plaintiff whole, the court cited *Lack. & W. R.R. v. Burson*,[43] a case which allowed a plaintiff interest *eo nomine*. The Pennsylvania Supreme Court admitted that there is confusion inherent in such a distinction between interest eo nomine and "compensation for detention of damages, measured by the interest rate." It made this admission in *Richards v. Citizens Natural Gas Company*,[44] in which it also set forth some of the factors the jury should consider in deciding whether to allow compensation for detention. The court said:

> . . . the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay of which the rate of interest affords the fair legal measure.
>
> These principles have been very recently affirmed by this court in *Railroad Co. v. Zeimer*, and *Plymouth Twp. v. Graver*; and although, as said by our Brother Clark, in the last case, there is some conflict in the decisions; it is not so much in regard to the principles as in the mode of expression. The contest has been whether the allowance should be made or not, and the name by which it should be called, whether interest or compensation for delay, measured by the rate of interest, received little attention, and it was incautiously said that interest was or was not to be allowed. The distinction, however, is important, for failure to observe it leads to confusion, as in the present case. Interest is recoverable of right, but compensation for defered payment in torts depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay, or in other ways the delay may be plaintiff's fault; or the liability of defendant may have arisen without fault, as in *Weir v. County of Allegheny* [citations omitted]. In such cases the jury would not and certainly ought not to make the allowance.[45]

It can be seen, therefore, that when the delay in payment of com-

42. *Id.* at 571, 17 A. at 188.
43. 61 Pa. 369 (1869).
44. 130 Pa. 37, 18 A. 600 (1889). The plaintiff was suing for injury to his house, caused by an explosion of natural gas which had escaped from defendant's pipes.
45. *Id.* at 40, 18 A. at 600.

pensation is the plaintiff's fault, such as when he makes an unreasonable settlement demand which the defendant is justified in refusing to pay, the jury may well find that he is not entitled to compensation for the delay.[46]

The result of *Richards* shows the injustice which can result from preserving a distinction between "interest" and "compensation for delay measured by the interest rate." After admitting that failure to observe the distinction causes confusion, the court then justified the distinction by saying that interest is something which can only be awarded as a matter of right.[47] No explanation was given as to why this might be so. Then, because the trial judge had instructed the jury that it might award interest on the plaintiff's damages, that amount of the award was stricken off the plaintiff's judgment. Yet, if the trial court had instructed the jury that it could compensate the plaintiff for the delay in payment of his damages and measure the compensation at the legal interest rate, the plaintiff would have kept the full amount of his judgment. The court justified this result by saying that by definition "interest" is something which is payable as a matter of right, and thus can't be awarded as discretionary compensation.[48]

Interest eo nomine has been awarded when it was due the plaintiff *as a matter of right* on damages for the taking of his land by eminent domain proceedings.[49] But, the fact that this is so does not justify refusing to call the same form of compensation interest when it is awarded *in a discretionary manner.* This is especially true when the refusal results in depriving a plaintiff of part of his judgment. Despite this, in 1894, the court refused to adopt a different rule because no statute provided for interest *eo nomine* from the date of damage or destruction and because the maxim "stare decisis" was a sufficient answer to any proposal to change the rule.[50] This seems inconsistent, since interest was originally allowed on unliquidated tort damages and this was later changed by the same court's decisions.[51]

There is one anomaly in this line of cases[52] which hold that compensation for detention of damages is allowed in the discretion

46. *Accord*, Conover v. Bloom, 269 Pa. 548, 112 A. 752 (1921); Pierce v. Lehigh Valley Coal Co. (No. 2), 232 Pa. 170, 81 A. 142 (1911).

47. Richards v. Citizens Natural Gas Company, 130 Pa. 37 40, 18 A. 600 (1889).

48. *Id.*

49. Weiss v. Borough of South Bethlehem, 136 Pa. 294, 20 A. 801 (1890).

50. *See*, Klages v. Philadelphia & Reading Terminal Co., 160 Pa. 386, 28 A. 862 (1894).

51. *E.g.*, Township of Plymouth v. Graver, 125 Pa. 37, 17 A. 251 (1889); Pittsburgh S.R.R. v. Taylor, 104 Pa. 306 (1884).

52. *E.g.*, Conover v. Bloom, 269 Pa. 548, 112 A. 752 (1921); Pierce v. Lehigh Valley Coal Co. (No. 2), 232 Pa. 170, 81 A. 142 (1911); James McNeil & Bro. Co. v. Crucible Steel Co. of America, 207 Pa. 493, 56 A. 1067 (1904); Irvine v. Smith, 204 Pa. 58, 53 A. 510 (1902); Richards v. Citizens Natural Gas Co., 130 Pa. 37, 18 A. 600 (1889).

of the trier of fact. That anomaly is *Stevenson v. Ebervale Coal Company*,[53] in which the court said the plaintiff had set his damages so inordinately high that the trial court should have peremptorily instructed the jury that the plaintiff could not receive any compensation for detention of his damages.[54] This is the only case besides *Pennsylvania R.R. v. Patterson*[55] in which a Pennsylvania court has been allowed to take the question of allowing compensation for detention of damages away from the jury.

It has been held that a trial court cannot give a jury binding instructions that they must award the paintiff compensation for the detention of his damages.[56] This is in line with the discretionary nature of the relief.

Thus, the proposition that ". . . in Pennsylvania, interest, as such, is not allowed, in actions sounding in tort, when the damages sought to be recovered are unliquidated. . . ."[57] has continued unabated down to the present time. The confusion inherent in the older cases is still present. In 1970 this confusion was manifested in *Marrazzo v. Scranton Nehi Bottling Company*.[58] In that case the defendant negligently destroyed the plaintiffs' building and personal property. At trial, with the judge sitting as the trier of fact, the defendant was found liable for the plaintiffs' damages. The judge awarded damages for the loss of the plaintiffs' building, machinery and equipment. He ordered interest to be paid on both amounts from the date of the fire.[59] The defendant filed exceptions to this and the court en banc, after apparently recognizing the verbal distinction between interest and compensation for delay, said the interest would be allowed to run only from the date suit was instituted.[60] The Common Pleas Court en banc held that this was a more appropriate date in fairness to all parties concerned because it appeared obvious that the trial judge could not properly assign cause for the delay to either party exclusively.[61] Both parties appealed. The Supreme Court of Pennsylvania said in its majority opinion that the "court en banc erred in speculating that the trial judge felt he could not assign cause for the delay to either party exclusively."[62] In disposing of the case the court said:

53. 203 Pa. 316, 52 A. 201 (1902).
54. *Id.* at 333, 52 A. at 202.
55. 73 Pa. 491 (1873).
56. Campbell v. Baltimore & O.R.R., 58 Pa. Super. 241 (1914).
57. Girard Trust Corn Exch. Bank v. Brink's Inc., 422 Pa. 48, 57, 220 A.2d 827, 832 (1966).
58. 438 Pa. 72, 263 A.2d 336 (1970).
59. *Id.* at 74, 263 A.2d at 337.
60. *Id.* at 76, 263 A.2d at 337.
61. *Id.* at 76, 263 A.2d at 338.
62. *Id.*

> The record does disclose a wide gap between the plaintiff's demands and the final award, but this fact alone is not dispositive of the issue. All circumstances relevant to the delay must be developed and analyzed.
>
> The judgment as to interest must be vacated and the record remanded so that the trial court can make findings of fact and conclusions of law as to the delay and determine whether compensation for that delay should be part of the final award.[63]

Thus, the court was reaffirming the rule that whether or not a plaintiff receives compensation for detention of his damages rests solely in the discretion of the trier of the facts.

In the majority opinion the court expounded the law on the matter in Pennsylvania as it stands today:

> Although there is language in some early cases to the contrary, [citations omitted], it is now the settled law in this Commonwealth that interest, as such, is not allowed in tort actions when the damages sought to be recovered are unliquidated. [citations omitted].
>
> This court, however, has developed the doctrine that: ". . . there are cases sounding in tort, and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value or other definite standards. Such are the cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure." [citations omitted]. We have emphasized that compensation for delay in payment is not a matter of right but is an issue for the finder of fact, the resolution of which depends upon all the circumstances of the case.[64]

The court then went on to hold that the onus for the delay in payment of such unliquidated tort damages should fall upon the party responsible for the delay. The court said:

> In *Pierce v. Lehigh Valley Coal Company (No. 2)*, [citation omitted], we outlined one important element: "The right to compensation . . . is, therefore, usually a question for the jury under the evidence submitted. If the fault in nonpayment of the claim rests with the defendant he cannot complain if he is required to compensate for the delay. If on the other hand the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff and required to pay damages for the

63. *Id.* at 76-77, 263 A.2d at 338.
64. *Id.* at 74-75, 263 A.2d at 337.

> delay in the settlement of the claim." [citations omitted]. The theory behind this element is the belief that the defendant would have been willing to settle the case at a much earlier stage if the plaintiff had made a reasonable demand and because the plaintiff made an unreasonable demand he cannot complain that he had not the use of the money during the period of litigation. The burden of proving that the demand was unreasonable is upon the defendant. [citation omitted].[65]

Chief Justice Bell wrote a dissenting opinion which presented the view that neither interest *eo nomine* nor compensation for detention of damages could be recovered in such a case:

> I dissent, and would not allow any interest in this trespass case. It is, and for a long time has been, the settled law in this Commonwealth that interest as such is not allowed in tort actions when the damages sought to be recovered are unliquidated: [citations omitted]. If there are to be any exceptions, I believe they should not be applicable in this case.[66]

Perhaps the dissenting opinion did not see any difference between interest *eo nomine* and "compensation for delay." Or, perhaps it meant that, since the trial judge had awarded interest *eo nomine*, that entire portion of the judgment should be stricken. Whatever the meaning of the dissenting opinion, it exemplifies the confusion, which apparently exists even in the Pennsylvania Supreme Court, inherent in the doctrine of distinguishing between interest *eo nomine* and "compensation for detention of damages, measured by the interest rate."

II. Interest As Usury

The confusion engendered by the doctrine of not allowing interest *eo nomine* on unliquidated tort damages and the unjust results which it can sometimes produce would seem to call for its repudiation. Before this can be recommended, the basis of the doctrine must be discovered to see if the reason behind it outweighs the results it produces.

History probably provides the best explanation for the Pennsylvania Supreme Court's disdain for the use of the word "interest" to describe compensation for delay measured by the legal interest rate. Historically, usury was not favored by the law, and the word "interest" was synonymous with "usury" in early times. Thus:

> It is only in modern times that the practice of bargaining for conventional interest has come to be sanctioned

65. *Id.* at 75-76, 263 A.2d at 338.
66. *Id.* at 77, 263 A.2d at 338-339 (dissenting opinion).

by law. Formerly, all agreed compensation for the use of money was condemned as "usury", but now the term "usury" has come to be applied only to excessive interest above the lawful rate avowed by statute. The inherent religious prejudices against interest generally have slowed the development of the practice of giving interest as damages.[67]

In Pennsylvania it would seem that interest *eo nomine* was first allowed at the discretion of the jury, and was later allowed at the jury's discretion under the name "compensation for delay." The ancient prejudice attached to the word "interest" probably accounts for the change in name.

This prejudice was evident as long ago as the time of Aristotle and Plato. It was especially strong when the law regarding interest began to develop in medieval England. At this time the main industry was agriculture and the church dictated the morals of the times. Thus:

> In this early pastoral stage, the highest ethical standards enjoined the giving of charity to those in need, or at least the making of gratuitous loans, and frowned upon the taking of recompense for lending to the needy. Since the needy were the only borrowers, the practice of "usury"—receiving any recompense for money lent—was condemned outright. Thus Plato and Aristotle in Greece regarded lending on interest as unworthy, and Moses invoked the sanction of religion against the practice. Philosophy and religion were reinforced by the power of a sounding metaphor, "money cannot breed money." The Christian Church zealously espoused this moral concept, and throughout the medieval period the canon law absolutely forbade the receipt by Christians of recompense for the lending of money. . . . By the end of the Medieval period, however, mercantile and industrial enterprise had come to assume an ever increasingly important share in the economic system of Europe. A practice which was oppressive and extortionate when applied to the poor peasant borrower was helpful and stimulating to trade when applied to the merchant seeking to finance the sale of his wares abroad.[68]

This stigma of moral and religious taboos has distorted the growth of the law regarding compensation for delay in paying damages.[69] This is unfortunate because the evil of unconscionable extortion is absent when a court exacts interest instead of a moneylender.[70]

It is submitted that the historical considerations quoted above are the true reasons why the Pennsylvania Supreme Court will not allow interest *eo nomine* but, instead, insists that the award must be expressed as compensation for detention of damages, measured

---

67. C. McCormack, Damages § 51 at 206 (1935).
68. *Id.* at 207 (footnotes omitted).
69. *Id.* at 209.
70. *Id.*

by the interest rate. "The rule *may* have a proper field of operation where the allowance can only be based on a more or less indefinite estimate, but otherwise the distinction is a mere verbal one."[71] It is further submitted that the confusion and injustice worked by such a verbal distinction, especially since it has no valid basis for existing, should call for the overruling of the distinction. Since the Pennsylvania Supreme Court brought the distinction into existence by implicitly overruling previous decisions,[72] it could now overrule the distinction.

III. Compensation for Detention of Damages in Personal Injury Cases in Pennsylvania

The rule regarding compensation for delay in payment of damages for personal injury is quite simple in Pennsylvania. The rule is that there can be no such compensation from the time of the injury until the time a verdict is rendered.[73] It is said that this is because in "a personal injury case the damages are assessed as of the date of the trial and not of the injury; hence there can be no general compensation for delay [citations omitted]."[74]

IV. The Law in Other Jurisdictions

Upon examining decisions from various jurisdictions, other than Pennsylvania's, involving compensation for detention of unliquidated tort damages, it will be noted that ". . . these decisions reflect a degree of confusion not easily found in any other field of the law."[75] An examination of the cases which follow will show that the hand of history, in the form of prejudice against usury, has lain heavily on many jurisdictions.

A. Real or personal property

Pennsylvania and South Carolina[76] are perhaps the only two jurisdictions which hold that interest *eo nomine* may not be awarded. These two jurisdictions allow "compensation for detention of damages" rather than interest *eo nomine*. However, in

71. Stevens-Scott Grain Co. v. Atchison, T. & S. F. Ry., 96 Kan. 1, 2, 149 P. 744 (1915) (emphasis added).
72. *E.g.*, Township of Plymouth v. Graver, 125 Pa. 37, 17 A. 251 (1889).
73. *See*, Rice v. Hill, 315 Pa. 166, 172 A. 289 (1934); Conover v. Bloom, 269 Pa. 548, 112 A. 752 (1921).
74. McGonnell v. Pittsburgh Ry., 234 Pa. 346, 399-400, 83 A. 282, 283 (1911).
75. Annot., 36 A.L.R.2d 345 (1954).
76. *See*, Knight v. Sullivan Power Co., 140 S.C. 296, 138 S.E. 818 (1927).

South Carolina it has been held that if the trial judge inadvertently instructs the jury that it may allow interest *eo nomine*, that instruction will not be grounds for error if the jury returns a lump sum verdict.[77] This means that as long as the jury does not mention the word interest in rendering its verdict, the fact that it did allow such interest pursuant to the judge's instructions will not be grounds for striking any amount off the verdict.

In most jurisdictions the owner can recover interest *eo nomine* as compensation for detention of his damages at the jury's discretion,[78] ". . . at least where the amount of damages is determinable by fixed rules of evidence and known standards of value. . . ."[79] In many of these jurisdictions interest *eo nomine* is allowed by statute, either at the jury's discretion[80] or as a matter of right.[81] Conversely, there is authority[82] "to the effect that there can be no recovery of interest in an action to recover unliquidated damages for an injury to realty. . ."[83] unless provided for by statute.

As the preceding discussion shows, there are various methods of compensating a plaintiff for the detention of his unliquidated tort damages.. This variety reflects the difficulty the various courts have experienced in dealing with the concept of interest.

---

77. *Id.* at 304, 138 S.E. at 820-821.

78. *E.g.*, Young v. New York, N.E. & H.R. Co., 273 Mass. 567, 174 N.E. 318 (1931); Lucas v. Wattles, 49 Mich. 380, 13 N.W. 782 (1882); State v. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941).

79. 25 C.J.S. DAMAGES § 53 (1966).

80. *E.g.*, CONN. GEN. STAT. ANN. § 37-3 (1969).

> Interest at the rate of six per cent a year, and no more, may be recovered and allowed in civil actions, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable.

Id.

81. N.Y. CIV. PRAC. § 5001 (McKinney 1963).

> (a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion. (b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date. (c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Id.

82. *E.g.*, Geohegan v. Union El R.R., 266 Ill. 482, 107 N.E. 768 (1915).

83. 25 C.J.S. DAMAGES § 53 (1966).

B. Personal injuries

In the various jurisdictions the "general rule in the absence of statute is that interest cannot be awarded as damages in actions for personal injury."[84] This rule is usually justified by the rationale that in ". . . actions of this class damages are assessed by a jury up to the date of the trial, and include all future as well as past sufferings and disabilities. Hence no interest is allowable from the date of the injury."[85] This rationale springs from the fact that past and prospective damages are not usually separated in the jury's verdict. For example, past damages for medical bills and lost wages already incurred are lumped together with future medical bills and lost earnings, which are considered to be too indefinite to estimate before trial.[86] However, interest for detention of damages composed of past medical and hospital bills will occasionally be allowed if the jury separates them from pain and suffering and future bills and lost wages in the verdict.[87] Interest is not allowed by case law for detention of damages for pain and suffering because such damages are considered too speculative.[88]

Some jurisdictions have passed statutes allowing interest for detention of unliquidated personal injury damages.[89] Most of these statutes allow interest at the discretion of the jury from the date of the event,[90] or as a matter of right from the date of commencement of the suit.[91]

---

84. *Id.*
85. Blake v. City of Waterbury, 105 Conn. 482, 487, 136 A. 95, 97 (1927).
86. Central of Ga. Ry. v. Newton, 23 Ga. App. 96, 97 S.E. 553 (1918).
87. *See*, Lawson v. Fordyce, 237 Iowa 28, 21 N.W.2d 69 (1945).
88. Central of Ga. Ry. v. Newton, 23 Ga. App. 96, 97 S.E. 553 (1918).
89. *See* statutes cited notes 90 and 91.
90. *E.g.*, N.D. CENT. CODE § 32-03-05 (1960):

> In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury.

Id.

91. *E.g.*, COLO. REV. STAT. ANN. § 41-2-1 (1964):

> Interest on damages—In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association or partnership, whether by negligence or by willful intent of such other person, corporation, association or partnership, and whether such injury shall have resulted fatally or otherwise, it shall be lawful for the plaintiff in the complaint to claim interest on the damages alleged from the date said suit is filed; and when such interest is so claimed, it shall be the duty of the court, in entering judgment for the plaintiff in such action, to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on such amount, calculated from the legal rate from the date such suit was filed to the date of entering said judgment, and to include the same in said judgment as a part thereof.

Both types of statutes may be criticized because they allow interest as compensation for detention of both past and future earnings and medical bills. There seems to be an element of unfairness in allowing a plaintiff interest from the date of the accident or the filing of suit as compensation for detention of damages which he will be suffering years in the future; and for which he will be compensated in one lump sum in the present.

V. Comparative Evaluation of the Various Methods of Compensating for Detention of Damages to Property

The rule that allows interest *eo nomine* or "compensation for detention of damages" at the discretion of the trier of the facts has several obvious merits. If the trier of the facts finds that a plaintiff has tried to settle his case in a reasonable manner, then it would seem just to require a recalcitrant defendant to reimburse him for the detention of his damages. On the other hand, if the trier of fact finds that the plaintiff has demanded an unreasonable sum in settlement, the fault for the defendant's refusal to settle should lay with the plaintiff. Also, the trier of fact, by its verdict, can implement the policy which says that a plaintiff, who "through his inaction and failure to prosecute his suit with due diligence, cannot justly claim to be entitled to damages for unlawful detention of money by the defendants."[92] This rule which allows compensation for detention of damages, depending upon the culpable actions of one of the parties, satisfies the premise that "moral wrong is . . . an inseparable incident of the assessment of monetary damages."[93] Finally, the rule that compensation for detention will be awarded in the discretion of the trier of facts may induce a plaintiff to keep his settlement demands within reasonable bounds, and induce a defendant to meet these demands. Such a rule encourages settlement before trial, which is always favored by the law.

The alternative to the above discretionary rule is the rule that a plaintiff should recover compensation for detention of his damages as a matter of right. This rule is based on the premise that such detained damages are analogous to a legal debt, which bears

---

Id.; N.H. Rev. Stat. Ann. § 1-b (Supp. 1969):

> Interest from Date of Writ. In all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added forthwith by the clerk of court to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of such verdict or finding even though such interest brings the amount of the verdict or findings beyond the maximum liability imposed by law.

Id.

92. Elk v. Bowen, 2 Conn. Cir. 105, 108, 195 A.2d 574, 576 (App. Div. 1963).

93. C. McCormack, Damages § 57a at 227 (1935).

interest as a matter of right.[94] However, it should be pointed out that this rule allowing interest as a matter of right from the date of the event might tend to encourage plaintiffs to be unrealistic in their settlement demands so that as much interest as possible can accrue.

Both of the rules discussed above have favorable aspects. Therefore, it is submitted that a very salutory rule could be devised by combining these favorable aspects. As far as property damage is concerned, it is submitted that the best rule would be to allow discretionary interest from the time of the happening of the event to the time suit is filed, and allow interest as of right after suit is filed. Thus, the trier of facts could evaluate any responsibility for delay before suit is brought and allow interest accordingly. This practice will place the onus on the party responsible for the delay. Then, interest would be awarded as of right for the time between the bringing of suit and the rendering of a verdict. This practice would partially satisfy the view which says that a plaintiff is entitled to interest as damages for detention just as he is entitled to interest on a debt.[95] Under such a rule, a defendant could prevent a plaintiff from purposely delaying in order to let interest accrue after suit is filed, by taking remedial action to get the trial moving.[96]

---

94. A. SEDGWICK, ELEMENTS OF DAMAGES 130-131 (1896):

> In other cases of tort, where rights of property, or moneys worth, only are involved, there is every reason why, if a loss is fixed at a definite time, the plaintiff should be allowed, as of right, interest on the money representing it from that time. It is often said that since the amount may not have been ascertainable till verdict, it was not a debt; the plaintiff could not demand it, and the defendant could not pay it. This is perfectly true, but wholly irrelevant. The question is what has the plaintiff lost, and since his loss includes not only the rights destroyed or injured, but the value of their use, from the time of the loss, unless he obtains interest as an equivalent he is not remunerated. The essence of the plaintiff's claim is in the loss, not in the fact that the claim takes through the medium of a verdict a pecuniary form. It may be a more correct use of language to say that the plaintiff recovers damages for the loss of the use, and that interest does not begin to run till after judgment; but since interest is the form which in these cases the loss of the use always takes, the result will be the same—that the plaintiff should recover as a matter of right in addition to the sum of money representing the thing or rights which he has lost, a sum equal to the legal interest upon it. . . . there is no real line of division between liquidated and unliquidated demands; (indeed, properly speaking, if a claim for damages is disputed, it cannot be said to be liquidated until a verdict has been rendered,) . . .
>
> It follows from this, that where only pecuniary injury is involved and there is a definite time, as an initial point for the allowance of interest, . . . there is no room for the discretion of the jury.

Id.

95. *Id.*

96. PA. STAT. ANN. tit. 12, App. R.C.P. 209 (1967).

VI. Comparative Evaluation of the Various Methods of Compensating for Detention of Personal Injury Damages

The predominant practice of allowing no compensation for detention of personal injury damages was discussed earlier in this Comment.[97] It must be adversely criticized because it does not compensate a plaintiff for detention of damages for medical bills and lost wages which have become due and owing before a verdict is rendered.

Likewise, those statutes which allow a plaintiff compensation for detention of all damages in a personal injury suit were previously discussed.[98] They were adversely criticized because they would allow interest from the date of suit on future medical bills and lost wages.[99] Also, they compenate for detention of damages for pain and suffering, items perhaps too speculative to allow for any such compensation.[100]

Perhaps a better rule would be to allow compensation for detention of damages for past medical bills and lost earnings. Such compensation would be allowed at the discretion of the trier of the facts for the period between the happening of the event and the commencement of suit, thus placing the burden for any delay on the party who occasioned the delay. Such compensation would be allowed as a matter of right for the period after commencement of suit. Such a rule would prevent recovery for future medical bills and lost wages, which would not become payable until a verdict is rendered. Of course, such a rule would require more effort by the courts because it would require them to make certain that juries properly apportion their verdicts. But, any added burden on the courts may well be worth the just results which might result from employing such a rule.

Conclusion

As was mentioned earlier, Pennsylvania's policy of distinguishing between interest *eo nomine* and "compensation for detention of damages, measured by the interest rate" has led to confusion and

---

97. See discussion under section IVb of this Comment *supra*.

98. See notes 90 and 91 *supra*.

99. *Cf.* C. McCormack, Damages § 56 (1935):

> In such cases the recovery is assessed, not on the basis of the loss capitalized at the time of injury (as in death cases), but on the basis of the facts as they appear at the time of trial. That is, plaintiff recovers for past loss of earnings plus his probable future loss of earnings. Obviously, it would be error to allow interest for delay in paying the latter sum. On the contrary, the recovery for loss of future earnings must be reduced under the "present worth" doctrine because the judgment requires them to be paid before the earnings would actually accrue. . . .

Id. at p. 225.

100. *See*, Central of Ga. Ry. v. Newton, 23 Ga. App. 96, 97 S.E. 553 (1918).

inequitable results. The distinction has its basis in an outmoded practice of equating interest with usury. It came into being by judicial decision and could be overruled by judicial decision. It is submitted that the distinction should be overruled and that interest *eo nomine* be awarded for the detention of damages. Thus order and justice would be returned to this area of the law.

It would probably be better to allow interest *eo nomine* as a matter of right after suit is brought. However, this would be such a radical departure from the present discretionary rule that a court would probably feel restrained from doing so because of the principle of stare decisis.

Fortunately, there is a bill[101] pending in the Pennsylvania legislature which, if passed into law, would allow interest as of right on unliquidated tort damages from the time suit is brought. The bill, which has been passed by the House and now rests in the Senate, contains the following pertinent sections:

> Section 1. Upon receipt of a praecipe from any party moving to reduce a verdict or award to judgment, the prothonotary of every court of record shall add to all verdicts or awards recovered in actions for death, personal injuries or damages to property caused by unlawful violence or negligence, prior to entering judgment thereon, interest at the rate of one-half of one per cent per month from the date when suit or litigation was commenced in accordance with the direction and computation set forth in the praecipe, except that interest shall not commence to run until the expiration of a period of six full months from the date on which the cause of action arose.
>
> Section 2. The prothonotary shall be entitled to receive a fee of one dollar ($1) for filing such praecipes and adding the interest to the verdict or award.
>
> Section 3. This act shall take effect immediately.[102]

It should be noted that the bill is not completely satisfactory in its present form. It does not state whether a plaintiff is to be compensated for detention of his damages before suit is brought. Perhaps, since compensation for this period is not included, the proposed statute would be interpreted to mean that a plaintiff can receive no compensation for that period. Any such construction would not fully compensate the plaintiff. Also, the language of the bill would allow interest from the date suit is commenced on future medical bills and loss of future earnings. Despite these imperfections, the bill indicates that the Pennsylvania Legislature may soon take a much-needed step in alleviating the confusion and

101. H.B. 275 (1969 Sess.).
102. *Id.*

inequity which now exists in Pennsylvania in the area of unliquidated tort damages.

LARRY FOLMAR